IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.531 OF 2005

Ishwara Bhau Mutal .. ..Appellant

Versus

Tukaram Bhau Mutal & ors. ... ..Respondents

Mr.Milind Deshmukh for appellant

CORAM : P.V.KAKADE, J.

DATE : 2ND AUGUST, 2005.

P.C.:

1. The appellant preferred this appeal against the judgment and order passed by Addl.District Judge, Satara dated 22.3.2004 allowing the appeal to the extent of setting aside the order of the trial court in respect of so-called counter claim, however, the rest of the judgment and decree in the suit came to be confirmed.

2. I have heard the learned counsel for the

appellant. Perused the record.

3. The plaintiffs filed the suit for partition and separate possession of 1/4th share in the suit properties. It was the case of the plaintiffs that the suit properties were ancestral and owned by the joint family of the plaintiffs and the defendants and each of them had 1/4th share therein. According to them, no partition was effected amongst them but the possession were only as per separate convenience. It was further alleged that the defendants refused to give plaintiffs' share in the suit properties hence the suit came to be filed. The defendant no.1 did not file the written statement. The defendant no.2 filed written statement submitting that he had never refused to partition and on the contrary he had no objection for partition by metes and bounds, however, the suit properties were not completely described and added according to the defendant no.1. Plaintiff no.1 i.e. the father of the plaintiff no.3 and the defendants had received the properties by virtue of gift deed dated 21.12.1966, which were not added in the suit properties and therefore, those required to be brought in hotch pot.

. The learned trial judge adjudicated the dispute on merits and came to the conclusion that the plaintiffs proved that the suit properties covered by the gift deed, were required to be added in the suit properties, which was subjected to the partition and accordingly the suit came to be decreed for partition including the suit properties covered under the gift deed. The appeal was carried to the District Court. The Addl. District Judge after hearing both the parties came to the conclusion that in fact there was no counter claim filed by the defendant No.1 and as such the lower court had no reason to hold that the suit properties covered under gift deed, assuming that there was counter claim filed by the defendant no.1. Rest of the decree for partition came to be confirmed.

4. The learned counsel for the appellant submitted that in fact there was a statement in the written statement filed by defendant no.2 to the effect that they were ready to pay the requisite court fees. The learned lower appellate court, has rightly, held that mere such statement to the effect that they were ready and willing to pay requisite fees would not mean the counter claim, which covers by process of filing the

counter claim and therefore, the findings recorded that there was no counter claim at all filed before the trial court and the appeal to that effect was allowed.

. I do not see any reason whatsoever to interfere with the said findings recorded by the lower appellate court, especially when it cannot be considered as substantial question of law. Moreover, the the lower appellate court has rightly appreciated the entire evidence on record and therefore, it would brook no interference.

5. In the result appeal stands dismissed.